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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS
Petitioner

v.

COMPAGNIE GENERALE TRANSATLANTIQUE
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 42(3) of the Supreme Court Rules, the National Association of Stevedores respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the petitioner. Counsel for the petitioner has consented to the filing of this brief. Counsel for respondent has not.

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STEVEDORES

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-Profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and suporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 61 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the state of Hawaii. Based upon U.S. government manhour statistics for calendar year 1974 it is conservatively estimated that NAS member companies are responsible for over 70 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor, some of whom may be entitled to federal Longshoremen's and Harbor Workers' Compensation Act,[1] (hereinafter the "LHWCA") and some of whom may be subject to state workers' compensation laws. The NAS member companies are directly responsible for workers' compensation payments under both federal and state law either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interests of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker.

LHWCA insurance costs, be they premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits, the amount of such benefits, or the amount of damages recoverable from a third party in an action in negligence has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Courts of Appeals and in this court in *Northeast Marine Terminal Corp.*, v. *Caputo et al.*, 432 U.S. 249 (1977).

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured longshoremen such as the petitioner in this case. *Amicus curiae* does not believe that the parties have considered the issue before this Court in precisely the same manner.

[1] 33 USC § 901 *et seq.*

Amicus curiae therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

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THE STATUTE INVOLVED

This case involves the proper construction of section 5 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 USC § 905, as amended by section 18(a) of Public Law 92-576, 86 Stat. 1263, and in particular to new section 5(b). Sections 5(a) and (b) of the LHWCA now provide:

EXCLUSIVENESS OF *REMEDY AND THIRD-PARTY* LIABILITY

SEC 5. (*a*) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under *the* Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, *or* that the employee assumed the risk of his employment, *or* that the injury was due to the contributory negligence of the employee.

(*b*) *In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship*

building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act. (The matter in italics was added by Public Law 92-576).

QUESTION PRESENTED

In an action in negligence brought by an injured longshoreman against a vessel owner, not his direct employer, does section 5(b) of the LHWCA, 33 USC § 905(b), permit a reduction in the vessel owner's liability to the injured longshoreman when, in addition to the vessel owner's negligence, there is contributing negligence of the injured longshoreman and his direct employer, a stevedore contractor responsible for the payment of worker's compensation benefits to the injured longshoreman under other provisions of the LHWCA?

SUMMARY OF ARGUMENT

This case is the third of four cases this Court has agreed to hear involving the 1972 amendments to the LHWCA which have been characterized by courts and commentators as lacking clarity and precision. The lack of clarity and precision has caused chaos and confusion in industries and their insurance carriers affected by the LHWCA to such a degree that LHWCA insurance is virtually unobtainable, or when obtainable, only at extraordinary cost. Because of this the Subcommittee on Compensation, Health and Safety of the House of Representatives Committee on Education and Labor in the 95th Congress has conducted extensive oversight hearings and has printed one volume of its hearings for the

year 1977. The 1978 hearings and committee report are yet to be published by the Subcommittee.

This case involves the interpretation of one of the cornerstone amendments to the LHWCA in 1972, and particularly an attempt by respondent and the Fourth Circuit Court of Appeals to attribute to the 1972 Congress a knowledge of a development in the maritime law of damages announced by this Court in 1975. The NAS believes that the legislative history of the 1972 amendments and the law itself demonstrate that Congress in 1972 was completely unaware of what this Court would do in 1975, and that it plainly did not intend the result of the decision of the Fourth Circuit concerning the apportionment of damages in an action in negligence brought by an injured employee against a vessel which was not his employer. Indeed, all other Circuit Courts of Appeals which have decided similar cases have decided them exactly the opposite of the Fourth Circuit's decision in this case.

The NAS believes that the Congress in 1972 did not knowingly or inadvertently change existing law on the measure of damages a negligent third party owed to an injured employee of a stevedore contractor who was providing stevedoring services to the vessel or to any other entity. It is clear that Congress did accept existing law that the negligence of the injured worker could be deducted from the total jury found damages against the negligent third party vessel, but that Congress did *not* also permit a deduction from such damages for the negligence of fellow workers of the injured employee nor of his employer. Congress did intend that in the action in negligence the negligence of the fellow worker or employer could not be the only basis for a finding of negligence by the vessel. Some active negligence must be proved to have been the vessel's. That is all that Congress intended on that subject.

The NAS also believes that when Congress declared unlawful indemnification agreements between the vessel and the employer and expressly made the employer liable to the injured worker only for LHWCA compensation benefits, and nothing else either directly or indirectly, that Congress realized that the employer and its insurance carriers would have to husband all available resources to pay for the greatly increased LHWCA compensation benefits. Adoption of the rule announced by the Fourth Circuit would directly contravene that intent of Congress and would create an incalculable drain on the resources needed to pay the increased compensation benefits.

Finally, in view of the fact that the Congress is in the process of extensive legislative review of the LHWCA and the 1972 amendments and that further amendments to the Act are probable, the NAS submits that it would be inappropriate for the Court at this time to make such a drastic change in existing law as urged by the respondent and the Fourth Circuit. The respondent should present its case to the Congress as has every other interested party for the past two years. The issue here has enormous ramifications which spread far beyond respondent's interest in reducing its obligation to Stanley Edmonds. The decision in this case will seriously affect every employer, employee, and insurance carrier to which the LHWCA applies. Such a decision should not rest solely on the interests in this case, especially when the affected employer and its insurance carrier were not even involved in the litigation and the Congress is reviewing in extensive oversight hearings all aspects of the Act.

ARGUMENT

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) 33 USC § 901 *et seq.* by enacting Public Law 92-576. As this Court has stated, in 1972 the Congress attempted to meet the expressed desires of (1) ship owners, (2) employers of longshoremen (stevedores), and (3) longshore workers "by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements [; continuing] to allow suits against vessel or other third parties for negligence [; and raising] benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act" *Northeast Marine Terminal Co.* v. *Caputo*, 432 US 249 (1977). Congress' lack of precision in accommodating the conflicting interests has been noted by this Court and every other federal court which has been required to interpret the 1972 amendments. Indeed, this is the third time this Court has agreed to hear a case involving the 1972 amendments. First, it was *Northeast Marine Terminal Co., supra*, on the question of the shoreward extension of LHWCA coverage by the 1972 amendments. The second is *Director, Office of Workers' Compensation Programs et al.* v. *Rasmussen et al.*, Nos. 77-1465 and 1481 now pending, concerning the issue of the limitation on LHWCA death benefits, and the third is this case.[2] In each instance, Courts of Appeals have reached differing conclusions requiring this Court to ultimately decide what Congress actually did in 1972.

[2] Recently the Court has accepted a fourth case, *P. C. Pfeiffer Company et al.* v. *Ford et al.*, No. 78-425.

As a result of this Court's decision in *Northeast Marine Terminal Co., supra* stevedore employers found that many more workers than they had thought were entitled to the substantially increased benefits of the LHWCA. If the court agrees with the Ninth Circuit in *Rasmussen, supra* the stevedore industry and all other covered employers will learn to their dismay that benefit levels were increased far beyond their understanding of what Congress intended. But the controversy presented by this case is the basic cornerstone of the 1972 amendments compromise, and if the decision of the Fourth Circuit prevails, then there was no compromise. The stevedore employer will have lost much more than he gained. All of the pre-1972 disabilities and injurious extensive third-party litigation will be restored to the stevedore employer plus substantially increased compensation obligations to a much greater number of workers. In return for virtually nothing the stevedore industry will be faced with almost unrestricted compensation liability; an almost nonexistent insurance market; and endless third-party litigation to determine the amount of neglience, if any, of the vessel, the employer, and the injured employee, and the distribution of the employee's third-party recovery. As to this industry, the disaster of 1972 will be complete, and to some, final.

The Decision Below

The decision of the Fourth Circuit,[3] knowingly and deliberately contrary to every other Circuit Court which has decided the issue, permits a jury to decide the total amount of damages to which an injured worker is entitled, and then the degree of negligence of (1) the employer, (2) the worker, and (3) the third party vessel. The third party would be obliged to pay the worker directly, damages equal only to its percentage of all

[3] *Edmonds* v. *Compagnie Generale Transatlantique*, 577 F.2d 1153 (4th Cir. 1978).

negligence. In this particular case the employer was found to be 70% at fault even though he was not a party to the action, and could not have been made a party by either the injured worker or the third party vessel. Because Edmonds' employer was not a party to any of the proceedings in the District Court or the Fourth Circuit the Court did not decide nor discuss the employer's compensation lien against the jury award authorized by section 33 of the LHWCA (33 USC § 933).

In limiting the damages Edmonds was to receive from the vessel to that portion of the total jury award directly attributable to Compagnie Generale Transatlantique (CGT), the vessel owner, the Fourth Circuit stated:

> "Our holding is only that he may not recover from the ship damages attributable to the neglect or actions of his fellow longshoremen or others than the ship's crew.
>
> "We are aware, of course, that our decision today is in conflict with decisions in the Fifth and Ninth Circuits." (577 F.2d at 1156)[4]

In addition, the Court's decision is also in conflict with decisions of the First and Second Circuits.[5]

CGT and other vessel owners now assert that in an action in negligence brought by an injured longshoremen Congress in 1972 intended that the vessel only pay to the injured worker that portion of jury-found damages solely attributable to the vessel, its agents and servants (in this case, only $20,000 of $100,000).

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[4] *Samuels* v. *Empressa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. May 26, 1978); *Shellman* v. *United States Lines*, 528 F.2d 675 (9th Cir. 1975) *cert. denied*, 425 U.S. 936 (1976); *Dodge* v. *Mitsui Shinataku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975) *cert. denied*, 425 U.S. 944 (1976).

[5] *Cella* v. *Partenreederei M.S. Ravenna*, 529 F.2d 15 (1st Cir. 1976), *cert. denied* 425 U.S. 975 (1976), and *Zapico* v. *Bucyrus-Erie Co.*, 579 F.2d 714 (2nd Cir. June 15, 1978).

The Statute and the Legislative History

The statute is totally silent on this point. Section 905(b), (33 USC § 905(b)), simply provides that (1) an injured worker may bring an action in negligence against the vessel pursuant to section 33 of the Act; (2) the employer shall not be liable to the vessel for such damages directly or indirectly; and (3) any agreements or warranties between the employer and the vessel to the contrary shall be void. The liability of the vessel is not to be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. Sections 905(a) and (b) do not mention degrees of employer fault, and section 905(a) specifically proscribes defenses of negligence of fellow servants, assumption of the risk, and contributory negligence.

It has been held that the statute permits the comparative negligence of the *employee* to be offset against jury-awarded third-party damages, and Congress in 1972 recognized the judicially fashioned rule of comparative negligence in only one limited instance. The Committee reports provide:

> ". . . the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the *injured employee's own negligence* may have contributed to causing the injury." (Senate Report 92-1125, page 12; House Report 92-1441, page 8, emphasis supplied, 92nd Cong. 2nd Sess. in 3 U.S. Code Cong. & Admin. News pg. 4705).

That passage is the only mention of comparative negligence in either Committee report, and neither report nor the statute itself address the question of contributing or comparative negligence of the *employer* in negligence actions brought by the injured worker against a vessel.

Congress did not intend for the employer to be a party to such actions, and expressly limited the injured worker's recourse against his employer to statutory compensation, and prohibited the vessel from *directly* or *indirectly* passing on any portion of its liability to the employer.

> "Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.
>
> Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.
>
> Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages." (Senate Report, Page 11, House Report pg. 7.)

The Fourth Circuit apparently recognizes the intent of Congress insofar as exclusivity of remedy as between employer and employee and the proscription of indemnity and contribution under any circumstances between vessel and stevedore (577 F.2d at 1154). However, the Court felt that apportionment of damages is permitted because of an alleged conflict between the first and second sentences of Section 905(b) (577 F.2d at 1155).

We submit that the Court has misread the statute, and that the first and second sentences in the section refer to different factual situations. So understood, the first and second sentences are not in conflict. The first sentence refers to actions against the vessel when the employer is not the vessel, its owners or agents. That sentence provides that the vessel may not seek directly or in-

directly to recover any portion of its damages from the injured man's employer. Obviously, if the vessel were the man's employer it would not seek to collect a portion or all of its damages from itself.[6]

The second sentence applies only in negligence actions when the vessel is the direct employer of the injured employee. The first clause makes that clear beyond doubt. The sentence provides:

> "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

That simply means that if the vessel directly employs persons to provide stevedoring services then the negligence of fellow longshoremen cannot be the basis of the vessel's negligence. The Committees recognized the unique situation that arises when the vessel is the direct employer and attempted by the second sentence in 905(b) to address that problem stating:

> "The Committee has also recognized the need for *special provisions to deal with a case where a longshoreman is employed directly by the vessel.* Accordingly, the bill provides in the case of a *longshoreman who is employed directly by the vessel* there will be no action for damages if the injury was caused by

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[6] The first sentence provides: "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." It is worthy to note that Section 5 does not include any mention of actions against other possible third parties against whom the injured worker may bring a suit under Section 33, such as trucks, railroads, or other entities to whom the worker's employer also provides service. What of apportionment in those situations?

> the negligence of persons engaged in performing longshoring services." (Senate Report, page 11, House Report, pg. 7, emphasis supplied).

Stanley Edmonds was not directly employed by CGT, so it is obvious that the second sentence of Section 905(b) does not apply to this case. Edmonds was a direct employee of the stevedore contractor, and the only limitation on the damages owed to him by the negligent vessel was Edmonds' own comparative negligence, not that of his employer or of his fellow longshoremen.

In every Circuit Court of Appeals except the Fourth, CGT would have been obliged to pay $90,000 in damages to Stanley Edmonds, and his employer or insurance carrier would have a lien against that amount equal to LHWCA compensation paid and to be paid in amounts determined by the Secretary of Labor or the Benefits Review Board. The Fourth Circuit believes that it would be inequitable (as to CGT) to follow its sister circuits and that CGT should be obliged to pay only 20 percent of the jury determined measure of damages. The Court recognized, but properly did not discuss, the impact of its decision upon the employer or its insurance carrier.

The Inequity of Apportionment of Damages

Prior to the 1972 amendments, if a longshoreman was injured on a vessel and both his employer and the vessel were partially negligent the stevedore employer, due to the now abolished indemnification agreements and the "seaworthiness" actions, the employer and its employee were often pitted in a contest to ascertain the degrees of negligence. Congress thought that situation to be contrary to public policy and sought to eliminate it and the exercise of the superior economic strength by the ship owner which compelled the employer to agree to indemnify the ship from its obligation. Thus, the doctrine of seaworthiness as

a basis for an action by a longshoreman against the ship was eliminated, and all devices to force the stevedore employer to assume or contribute to the ship owner's damages were declared void as contrary to public policy. LHWCA benefits were increased substantially and the plethora of third-party litigation substantially eliminated.

In 1975 this Court handed down its decision in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) and the equitable or Murray credit announced before enactment of the 1972 amendments by the U.S. Court of Appeals for the District of Columbia surfaced. *Murray* v. *United States*, 405 F.2d 1361 (DC Cir-1968), *Dawson* v. *Contractors Transport Corp.*, 467 F.2d 727 (DC Cir-1972). Until the decision of the Fourth Circuit all courts have rejected those theories or doctrines, especially in the light of this Court's decisions in *Halcyon Lines* v. *Haen Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), and *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

Until the Fourth Circuit's decision all parties agreed with the First Circuit that as a result of the 1972 amendments:

> "The stevedore-employer is no longer in the position of an adversary to an injured longshoreman in a third party suit." *Cella* v. *Partenreederei M.S. Ravenna*, 529 F.2d 15, 20 (1st Cir.-1976), *cert. denied*, 425 U.S. 975 (1976).

The Fourth Circuit's decision would change that. The litigation Congress sought to eliminate in 1972 would be restored in all respects, and the courts will be flooded with three party contests over degrees of negligence. Once again employer would be pitted against employee about degrees of negligence in litigation plainly contrary to the underlying scheme of workers' compensation law and the expressed intent of Congress.

The 1972 Compromise

Let us look at the results of the 1972 amendments and who gave up what or got what in return.

A. *The Vessel Owner*

The vessel owner gave up the right to require the stevedore contractor to indemnify it, hold it harmless, or otherwise contribute directly or indirectly to jury-found damages owed by the vessel for its negligence in an injury to an employee of the stevedore contractor. In return the vessel owner escaped liability without fault under the "seaworthiness" doctrine, and in addition, obtained immunity from certain suits for damages by persons in its direct employ. *Baker* v. *Pacific Far East Lines, Inc.*, 451 F. Supp. 84 (DC No. Cal. 1978).

B. *The Longshoreman*

The longshoreman gave up the right to bring an action against the vessel predicated upon no-fault, or "seaworthiness," but retained the right to bring an action in negligence. In return the longshoreman's scope of employment subject to the LHWCA was substantially enlarged, *Northeast Marine Terminal Co., supra* and the benefits payable under the LHWCA by his employer were incredibly increased.

C. *The Stevedore Employer*

The stevedore employer gave up no benefit, but was relieved of being forced by superior economic strength to indemnify or hold harmless the vessel owner in actions brought for damages by his employees against the vessel. He was also to be immune from suits by vessels for contribution to damages awarded against it.

In return for protection from the demands of its customers the stevedore employer found that many more of

his employees than before 1972 were entitled to the increased LHWCA benefits. Compounding that are the incredible levels of compensation benefits brought about by the 1972 amendments.

1. Prior to 1972 the maximum amount of weekly benefits payable was $70. Today the maximum is $396.78 (33 USC 906 (b)).[7]

2. Prior to 1972 weekly death benefits payable to survivors could not exceed 66 2/3 percent of $105. Now the limit on death benefits is 66 2/3 of 200 percent of the national average weekly wage ($396.78), subject to escalation annually.

3. Prior to 1972 death benefits were to be awarded only if the injury caused the death. Today, death benefits may be awarded in certain instances even if the death is unrelated to the injury or even to the employment (33 USC 909).

4. Today, many compensation benefits are escalated annually predicated upon annual increases in the average weekly wage as determined by the Secretary of Labor (33 USC 910 (f)).

5. The maximum amount of compensation benefits of $24,000 was eliminated. (Sec. 5(e) of PL 92-576)).

6. Today, required LHWCA insurance is virtually unobtainable, and, when it is, the premium costs far exceed the 1972 levels.[8]

7. As before 1972, the stevedore-employer, regardless of fault, must promptly and regularly pay LHWCA benefits to his injured employees (33 USC § 914(a)) unless

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[7] Department of Labor Letter No. 37, Sept. 29, 1978, Appendix B to this brief.

[8] House LHWCA Oversight Hearing, Vol. 1, 95th Congress, *infra*, pgs. 447, 462-481.

he controverts the employee's right to compensation. But today, if he controverts and loses he not only must pay the compensation plus fines and penalties (33 USC § 914(f)), but he must also pay the attorney fees of the injured worker (33 USC § 928).

As one witness testified to the Congress in 1977 during legislative oversight hearings into the LHWCA—*"The scale does not balance."*[9] Indeed, the scale is so unbalanced that every affected industry which is required to pay LHWCA benefits to its employees presented its grievances to the House subcommittee in 17 days of testimony during the 95th Congress, as is set forth in the subcommittee's report of October 14, 1978, *Congressional Record*, November 9, 1978 pages E5959-61 which is attached to this brief as Appendix A. Noticeably absent during those two years of hearings were those in whose favor the scales were most favorably tilted—the vessel owner.

What is the True Extent of Edmonds' Injury

It must be realized that there are two entities charged with the responsibility of determining the extent of tort damages and compensation payable to Stanley Edmonds as a result of his injury.

As to compensation payments, those payments necessary to compensate him for his injury and his loss of wage earning capacity (presumably the same factors to be considered as damages) Congress placed that responsibility on the Secretary of Labor and the Benefits

[9] (Hearings before the Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress, entitled "Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Part 1," at page 441.) The second volume of testimony given to the subcommittee in 1978 and the Committee staff report have not yet been printed.

Review Board, subject to limited appellate review by the Federal courts (33 USC § 921). Liability of the employer is absolute and interminable. It is not predicated upon his fault nor is it in any way mitigated by the contributory negligence of the employee, who may be 100% at fault and still recover full LHWCA benefits.

In this case Stanley Edmonds has already received LHWCA compensation benefits for temporary total and permanent partial disability from his employer-carrier in excess of $46,000 and continues to receive weekly payments of $184.07 (Initial Brief of *Amicus Curiae* Liberty Mutual at page 6). Every year, unless the extent of his disability is changed pursuant to section 22 of the Act (33 USC § 922), he will receive an additional $9,571.64. In only six years he will have received in excess of $100,000 in LHWCA compensation benefits plus damages recovered from CGT. Resolution of the third-party case between Edmonds and CGT does not extinguish the employer's liability for LHWCA compensation payments (33 USC § 933(f)) which may continue until his death or the death of his last survivor. If Edmonds were to die from an unrelated cause while receiving benefits for permanent partial or permanent total disability, LHWCA death benefits would be payable by the stevedore employer to his survivors (33 USC § 909, § 908(d)(3) and (f) regardless of the cause of death.

If compelled to litigate degrees of negligence including its own in a trial by jury involving the employer, the injured worker, and the vessel with all of the available discovery procedures provided by the Federal Rules of Civil Procedure, the legal fees the employer must incur will be enormous. In this case, had the employer been a party, those legal fees could well have exceeded $20,000. Stanley Edmonds, one way or another, would still receive $100,000. CGT would have paid $20,000 plus its legal fees. The employer would have paid, and will continue

to pay, compensation minus whatever recoupment he could obtain from Edmonds, plus his own legal fees at every stage of the proceedings.

Such a result, which is more probable than possible, would destroy what one court has recognized as a major reason why indemnity actions and employer contribution were prohibited by Congress, stating:

> "Elimination of the seaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to insure adequate funds for the increased benefits. In particular, the drain on the employer's resources by the attorney's fees and expenses required to litigate the third party indemnification actions was cited as an obstacle to funding adequate compensation benefits." (House Report 92-1441, 92nd Congress, 2nd Session in 3 U.S. Code Cong. & Admin. News, p. 4698, 4702 (1972). Senate Report 92-1125, 92nd Cong., 2nd Sess. (1972).
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> "We conclude that the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of increased benefits under the Act." (*Cella* v. *Partenreederi, M.S. Ravenna, supra,* at 529 F.2d pp. 20-21).

The reasoning of the First Circuit concerning the intent of Congress in 1972 to encourage the husbanding of the stevedore's and the insurance carrier's resources for the payment of increased LHWCA Compensation was recently adopted *per curiam* by the Second Circuit in *Bloomer* v. *C. Y. Tung and Eckert Overseas, Agency, Inc.*, No. 1187 decided October 12, 1978, —— F.2d —— (2nd Circuit-1978).

The full measure of the drain on the resources of the employer's insurance carrier to pay the increased compensation benefits under the Act is readily demonstrated.

If the employer controverted Edmonds' claim for permanent partial and temporary total disability pursuant to Section 14 of the Act (33 USC § 914) it would have to first go through a full administrative law proceeding before an administrative law judge (33 USC § 919(d)), and then a review proceeding before the Benefits Review Board (33 USC § 921(b)(3)), and then an appellate review in the appropriate U.S. Court of Appeals (33 USC § 921(c)). If an award of compensation is finally upheld, the employer-carrier must pay the award and his own attorney's fees plus those of the impaired worker (33 USC § 928). Throughout those proceedings the degree of fault of any party is not in issue. The only issues are whether the injury is covered by the Act, and if so what are the statutory benefits to be paid.

While the administrative process is being pursued, the injured worker may bring on action in negligence against the vessel as authorized in Section 5 and 33 of the Act (33 USC § 905, § 933).[10] If the injured worker recovers damages from the vessel the employer-carrier still must continue to pay LHWCA compensation if the compensation award of the Secretary of Labor exceeds the amount of jury-awarded damages recovered (33 USC § 933(f)). However, those compensation payments are only to be *in excess* of the damages recovered. All courts, including the Fourth Circuit, recognize that because of Section 33 of the Act, the employer has a lien or trust against the damages recovered equal to past and future compensation payments determined by the Secretary of Labor. Thus, in some measure the drain on the resources of the employer-carrier necessary to pay compensation is relieved. However, if any apportionment of damages involving the employer is granted, then the drain on the

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[10] Unless the worker is receiving compensation payments under an award by the Secretary, neither the employer nor its insurance carrier may bring an action against the vessel to recover the compensation payments (33 USC § 933(b), (d) and (h)).

employer-carrier resources is not relieved. In fact, it is further exacerbated, as it must then engage in an another new arena of costly litigation—the negligence action.

Having expended substantial resources to limit its compensation liability the employer-carrier must contemplate the expenditure of substantially more of its resources or sit idly by while others litigate its fortunes. The dilemna the employer faces cannot be over-stated. In the third party action does it argue that its employee was at fault, and thus act against its monetary interest in the amount of lien recovery? Or does the employer argue that the vessel was totally at fault and subject itself to the superior economic retaliation of its customer, also against its monetary interest? In almost every port in the nation it is relatively easy for a vessel to change stevedores, or to provide its own stevedoring services directly.

Whichever way the employer argues it must of necessity incur the legal expenses attendant to trials by jury in the district courts and appeals in the Circuit Courts of Appeals. The drain on its resources is compounded, and non-recoverable. It cannot simply pass on its added costs to the vessels for which it provides stevedoring services as competition will not permit it to do so.

Still another drain on the employer-carrier's resources looms on the horizon. If the injured worker is dissatisfied with the damages recovered from the third party he may return to the administrative forum of the LHWCA and request that the original compensation award be amended pursuant to Section 22 (33 USC § 922). The entire LHWCA administrative process commences anew, and the philosophy of the Benefits Review Board virtually insures an increased award. For example, in the instant case there is temporary total disability. The Benefits Review Board has determined that temporary total disability extends until the injured worker reaches maximum

medical recovery, *McCray* v. *Ceco Steel Co.*, 5 BRBS 537 (1977) and during that period of time compensation equal to 66 2/3 of his actual weekly wage is to be paid. There are instances where temporary total disability benefits have been paid in excess of five years.

The move from temporary total to permanent total disability is a simple matter today. No medical evidence is required. *Ballard* v. *Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 676 (1978). The fact that the worker may be able to work and earn wages does not preclude a finding of permanent total disability, *Ford* v. *Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978), and the employer must find actual and suitable work opportunities in the locality where the worker lives in order to defeat a claim for permanent total disability, *Kilsby* v. *Diamond Drilling Co.*, 6 BRBS 114 (1977).

On the other hand, the liability of the negligent third party vessel is determined by a jury and its findings are final and complete. The compensation liability of the employer is indeterminate.

Apportioning damages in ship collision cases may be appropriate, if only because at the time of apportionment the full and total damages are certain and final. However, when, as here, the injured worker has two avenues of recovery and two measures of damages, one of which (compensation) is uncertain and not final at the time of apportionment, apportionment is not appropriate. The third party tortfeasor should be held responsible for the full amount of negligence damages, and the employer for the full amount of compensation damages less the amount the injured worker recovered in damages from the third party vessel.

If the jury awards damages in excess of the compensation determined by the Secretary of Labor, the injured worker gains in his total recovery. If the jury awards

damages equal or less than the compensation determined by the Secretary of Labor, the injured worker actually receives no damages for the vessel's negligence, but does collect the full measure of compensation regardless of his own negligence.

Applying the reasoning of the Fourth Circuit to this case, the only winner is CGT as it would only be required to pay 20% of what may not really be the true amount of damages suffered by Stanley Edmonds. In that regard it must be asked "just what is the true measure of damages?" Is it what a jury awards or is it what the Secretary of Labor and the Benefits Review Board award pursuant to the provisions of the LHWCA?

Prior to 1972 those questions required no answer because the LHWCA benefits were so low and indemnification agreements, expressed or implied, so prevalent that it was unnecessary to know the answer. The stevedore employer paid everything. Today, the 1972 amendments authorize compensation at levels that would make a jury blush, and the employer's liability can be prolonged and virtually interminable.

The Issue Here is Congress' to Decide

Congress did not address this problem in 1972 just as it did not address the cost impact on employers or carriers of most of the changes it made in the Act. *Pittston Stevedoring Corporation et al.*, v. *Dellaventura et al.*, 544 F2d 35, (2dn Circuit 1975) affirmed *sub nom Northeast Marine Terminal Co., supra.* If apportionment of personal injuries damages founded on negligence is to be introduced into the law then it should be done by the Congress and not by the Courts. This is especially true since Congress has been reviewing for almost two years just what it did in 1972. The NAS believes that the

vessel owners should present their case to the Congress and let it determine if it has merit.[11]

Amendments to the LHWCA properly are the function of the Congress. As to the scope of shoreside coverage of the LHWCA this Court deferred to Congress in 1969, *Nacirema Operating Company* v. *Johnson*, 396 US 212, at 223-224 (1969), and again in 1971, *Victory Carriers* v. *Law*, 404 US 202 at 216 (1971). Congress responded in 1972 by enacting Public Law 92-576, *Northeast Marine Terminal Co., supra.*

In 1952 this Court deferred to Congress on the issue of contribution or apportionment of damages between a negligent vessel and a concurrently negligent stevedore employer as it concluded that the solution to that problem should await congressional action, *Halcyon Lines, supra,* 342 US at 285. In 1973 this Court had the opportunity to consider its decision in *Halcyon,* and concluded that the factors underlying that decision still had much force, *Cooper Stevedoring Co., supra,* 417 US at 112, stating:

> "Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers,

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[11] The Congress might very well decide that if damages for negligence are to be apportioned between the employer, the employee, and the third party vessel, then so too should workers' compensation benefits payable to the employee for the same incident. If the vessel is found to be negligent it should be responsible for its shares of *all damages,* tort or compensation, to be paid to the injured worker, whose injury it caused in whole or in part. In this case, for example, 20% of the jury award and 20% of the compensation award of the Secretary of Labor until the compensation award and possible amendments thereto, is fully and finally paid, or until all voluntary payments cease. On the other hand, Congress might also terminate all compensation payments when a third party recovery is obtained. (See also the comment of Subcommittee Chairman Gaydos—"Well, we will let the shipowners plead their own case." House LHWCA Oversight Hearings, Vol. 1, *supra,* pg. 442.)

employees, and their respective insurors, we refrained from allowing contribution in the circumstances of that case.

These factors underlying our decision in *Halcyon* still have much force. Indeed, the 1972 amendments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation should be the employee's exclusive remedy."

It is clear that Congress in 1972 did not change the rule that there could be no contribution between the stevedore employer and a negligent vessel for damages awarded the injured longshoremen. Congress did not, inadvertently or otherwise, overrule *Halcyon*. The Committee reports pertaining to Public Law 92-576 don't even mention *Halcyon*. Neither do they mention apportionment of damages in any context except as between an injured worker and a vessel when the injured employee's own negligence may have contributed to causing the injury. In that regard Congress merely restated the applicable law of damages and fashioned no new defense of which shipowners could avail themselves.

Even though Congress did extensively amend the LHWCA in 1972 it did not change the law as to third party damages. That subject is now precisely where this Court found the issue of contribution in *Halcyon* in 1952, and the factors underlying the *Halcyon* decision pertain today (342 US at 285, 286),

"In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provided protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone

else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee. Congress has made further inroads on traditional court law by abolition of the defenses of contributory neglience and assumption of risk and by the creation of a statutory schedule of compensation. The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act, the Public Vessels Act, the Limited Liability Act and the Harbor Act. *Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run.* A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. Apparently insurance companies

are opposed to such a change. Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." (Citations and footnotes omitted, emphasis supplied.)

CONCLUSION

Congress has indeed stopped short of approving the rule of apportionment of damages here urged, and we believe that it would be inappropriate for all the reasons stated in *Halcyon* for this Court to do so. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit should be reversed and the cause remanded to the District Court with appropriate instructions.

Respectfully submitted,

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Appendices

APPENDICES

November 9, 1978

CONGRESSIONAL RECORD

Extensions of Remarks

E5959

E5961

ACTIVITIES OF THE SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY FOR THE 95TH CONGRESS

HON. JOSEPH M. GAYDOS

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Saturday, October 14, 1978

• Mr. GAYDOS. Mr. Speaker, the subcommittee on Compensation, Health and Safety, on which I am pleased to serve as chairman, conducted extensive legislative and oversight hearings during the 95th Congress on the various matters subject to its jurisdiction.

The subcommittee jurisdiction encompasses the following public laws:

Occupational Safety and Health Act of 1970 (Public Law 91-596);

Federal Mine Safety and Health Act of 1977 (Public Law 95-164);

Federal Employees' Compensation Act (Public Law 93-416); and

Longshoremen's and Harbor Workers' Compensation Act (Public Law 92-576).

The subcommittee, during 1977 and 1978, held 43 days of oversight hearings on the following laws within its jurisdiction:

First. Occupational Safety and Health Act of 1970—14 days;

Second. Longshoremen's and Harbor Workers' Compensation Act—17 days; and

Third. Federal Employees' Compensation Act—12 days.

Additionally, the subcommittee held 13 days of legislative hearings on the following bills within the subcommittee's jurisdiction:

First. H.R. 4287, Federal Mine Safety and Health Amendments Act of 1977—6 days;

Second. H.R. 4286, Youth Camp Safety Act—5 days; and

Third. H.R. 13461, Asbestos Related Disease Screening Act of 1978—2 days.

LEGISLATIVE ACTIVITIES

C. The Longshoremen's and Harbor Workers' Compensation Act

The subcommittee conducted field hearings at San Francisco, Calif., on June 24-25, 1977, and 15 additional hearings at Washington, D.C.

Witnesses testifying before the subcommittee included Members of Congress, and representatives of the recreational boating industry, stevedore organizations, shipbuilders, the insurance industry, State insurance departments, labor organizations, the offshore drilling contractors, the Offshore Marine Services Association, the Associated General Contractors, the Office of Workers' Compensation Programs of the Department of Labor.

The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1972. In addition to upgrading certain of the benefit provisions of the act, the jurisdiction of the act was extended from "navigable waters" to "adjoining areas."

Industry witnesses submitted the following criticisms:

First. Jurisdiction: It is alleged that the extension to "adjoining" areas leaves vague and unclear just what operations on land are covered. The small recreational boatyards, in particular, are in a state of uncertainty as to the status of their employees working at locations which are not geographically adjacent to navigable waters. The small boat and barge builders expressed concern about their employees who may be involved in nonmaritime construction during extensive periods of the year.

Second. Unrelated death benefits: The law provides that if a claimant receives compensation benefits for either permanent partial or permanent total disability and dies from any cause, his widow and/or survivors would be entitled to certain benefits. It is contended this has the effect of adding a life insurance policy to a workers' compensation law.

Third. Annual escalation of benefits: It has been contended that the unpredictability of future annual escalation of benefits makes insurance premium assessment equally unpredictable, resulting in higher insurance costs.

Fourth. No limitation on weekly benefits to widows and/or survivors in case of death: Since there is a maxi-

mum payable for total permanent disability, it is alleged that, in certain instances, a widow could receive higher benefits from the death of the employee than if he was receiving total permanent disability benefits.

Fifth. Procedure for establishing loss of wage-earning capacity: It has been stated that in some cases a claimant receives compensation in excess of his take-home wages prior to injury.

Sixth. Employers' access to an independent physical examination: It has been alleged that in certain district offices, the deputy commissioners are unwilling to order an independent medical examination at the request of an employer.

Seventh. Settlements: It has been alleged that the administrative law judges have no authority to approve settlements, which results in excessive litigation.

Assistant Secretary Elisburg testified as to the administrative problems in implementing the act, but stated he intends to substantially upgrade the administration of the act. Additionally, he informed the subcommittee that the Labor Department has authorized a study to conduct an indepth study of insurance rates and availability under the act.

I would like to take this opportunity to thank Members of Congress and others who have appeared as witnesses before the Subcommittee on Compensation, Health and Safety, and I would particularly like to thank members of the subcommittee who have been so cooperative throughout the 95th Congress. ●

Part A pertaining to Mine Safety and Health and Part B pertaining to the Federal Employees Compensation Act omitted as not relevant.

U.S. DEPARTMENT OF LABOR

Employment Standards Administration

Office of Workers' Compensation Programs
Division of Longshore and Harbor
Workers' Compensation

Washington, D.C. 20210

September 29, 1978

[SEAL]

No. 37

NOTICE TO INSURANCE CARRIERS, SELF-INSURED EMPLOYERS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND OTHER INTERESTED PERSONS

Subject: Maximum and Minimum Compensation Rates Under Longshore Act Effective October 1, 1978; Adjustments of Permanent Total Disability and Death Cases

Section 6(b)(3) of the Longshoremen's and Harbor Workers' Compensation Act provides that prior to October 1 of each year, based on the national average weekly wage for the three calendar quarters ending June 30 of that year, the Secretary of Labor shall determine the national average weekly wage to be applicable for the period beginning October 1 of that year and ending with September 30 of the next year. It has been determined that the applicable national average weekly wage for the period beginning October 1, 1978, and ending September 30, 1979, is $198.39.

Section 6(b)(1)(D) provides that for the period October 1, 1978 through September 30, 1979 the maximum rate

of compensation under this Act shall not exceed 200 percent of the national average weekly wage. The maximum compensation rate for total disability for injuries sustained during this period is $396.78 (200 percent of $198.39). Compensation for disability subject to this maximum should be paid at 66-2/3 percent of the employee's average weekly wage as determined under section 10, subject to the foregoing limitation.

The minimum compensation rate payable for disability incurred in the above period is $99.20 per week, fifty percent of the national average weekly wage. However, if an employee's average weekly wage is less than this amount, he or she receives the employee's entire average weekly wage as compensation for total disability.

In computing death benefits covered by this applicable period, the average weekly wage of the deceased employee shall be considered to have been not less than $198.39 per week, but total weekly benefits may not exceed the average weekly wage of the deceased.

The foregoing maximum and minimum rates do not apply to employees covered by the Nonappropriated Fund Instrumentalities Act. The maximum and minimum rates for those employees change under a separate schedule, whenever Federal employees' pay rates change.

In accordance with subsections 10(f) and 10(h)(3) of the Act, effective October 1, 1978 the compensation or death benefits payable for cases of permanent total disability or death which occurred prior to October 1, 1978 are to be increased by 8.05 percent, the percentage by which the national average weekly wage of $198.39 (effective October 1, 1978) exceeds the previous national average weekly wage of $183.61 (effective October 1, 1977 through September 30, 1978). The weekly compensation after adjustment is fixed at the nearest dollar, and no adjustment of less than $1 shall be made. In no

event is compensation for death benefits reduced. District Offices of the Office of Workers' Compensation Programs will advise beneficiaries receiving payments, and insurance carriers and self-insured employers of the amount of adjustment due in each case.

Field or district offices of insurance carriers or self-insured employers paying benefits under the Longshoremen's and Harbor Workers' Compensation Act and related Acts (the District of Columbia Compensation Act, the Defense Base Act, the Outer Continental Shelf Lands Act and the Nonappropriated Fund Instrumentalities Act) will soon receive specific instructions from the Office of Workers' Compensation Programs (OWCP) District Offices for making the adjustments under section 10(f) in individual cases, and should begin paying at the new benefit levels as soon as possible.

If the section 10(f) increase is to be reimbursed to an insurance carrier or self-insured employer under procedures which have been established by the OWCP National Office, it will be indicated on form Ltr. LS-521 (rev.) for that case with the "Yes" block being marked on the front of the letter. If the "No" block is marked, the Section 10(f) adjustment is not subject to reimbursement by OWCP. In case of questions about implementing these mandatory adjustments, any district office or the OWCP National Office may be contacted. (Phone: Area Code 202—523-8721)

/s/ John E. Stocker

JOHN E. STOCKER
Associate Director for
Longshore and Harbor
Workers' Compensation